(33)

IN THE

Supreme Court of the United States

October Term, 1944

No. 1186.

MADEIRENSE DO BRASIL, S/A,

Petitioner,

against

STULMAN-EMRICK LUMBER CO.

PETITION FOR WRIT OF CERTIORARI

ALBERT M. PARKER,
of Counsel, for Petitioner.

INDEX

CASES CITED

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No. .....

MADEIRENSE DO BRASIL, S/A,

Petitioner,

against

STULMAN-EMRICK LUMBER CO.

PETITION FOR WRIT OF CERTIORARI

The petitioner, Madeirense do Brasil, S/A, prays for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit, entered on the 29th day of January, 1945, affirming a judgment of the United States District Court, Southern District of New York, which granted a motion for summary judgment against petitioner for the sum of $5,057,34, representing damages claimed by Stulman-Emrick Lumber Co., for breach of a contract for the sale of lumber by petitioner to said company, together with interest and the costs of action; and which denied petitioner's motion for summary judgment for the sum of $1,078.98, representing the balance of the agreed price of lumber sold and delivered by petitioner to said Stulman-Emrick Co. (R., 179-181).

The United States District Court, Southern District of New York, rendered its original opinion on December 20, 1943, and a supplemental opinion, after reargument, on

February 7, 1944. The opinions of the District Court are unreported, but are set forth in the Record, at pages 149 to 154, both inclusive, and at pages 170 and 171. The majority opinion of the Circuit Court of Appeals, and a dissenting opinion by Judge Jerome M. Frank are unreported, but are set forth in the Record at pages 185 to 202.

Jurisdiction

The decree of the Circuit Court of Appeals was rendered on the 29th day of January 1945 (R. 203). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

Questions Presented

1. May a United States District Court Judge dispose of disputed issues of damages, on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, where the affidavits submitted on such motion contain statements which permit of more than one inference with respect to one of the principal factors underlying the computation of damages; and where a jury would be at liberty to disbelieve the evidence forming the basis of the decision, and such evidence would not require a directed verdict for the moving party; and where, if the counterclaim had not been contested, such District Judge would have been required by Rule 55 (b) (2) of said Rules to call a jury on the issue of damages?

2. May a District Court Judge deny a plaintiff's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, for a balance of the agreed price of goods sold and delivered by such plaintiff to the defendant, where such balance is admittedly due to such plaintiff in the amount claimed, and where the defendant

makes a cross-motion for summary judgment under said rule, and such District Judge grants such cross-motion of such defendant, as the result of the assumption by such District Judge of powers beyond those vested in such District Judge, under said Rule?

3. May a seller of goods who receives an order for goods from a third party which acts as the intermediary between the buyer and the seller, be bound by the terms of a different order given by the buyer to the intermediary, but never communicated to the seller by such intermediary?

4. Where an order for lumber calls for shipment of such lumber by boat, but contains no specifications as to whether the shipment of such lumber should be made below deck, or on deck, is the obligation of the seller to arrange for such shipment discharged by a tender of such goods to the carrier for shipment on deck?

Statement

In October and November of 1940, the petitioner agreed to sell to the respondent 500,000 square feet of Brazilian pine lumber to be shipped from Brazil to the Port of New York (R., 64).

In November of 1940, the petitioner agreed to sell to respondent, an additional 250,000 feet of Brazilian lumber to be shipped from Brazil to the Port of New York (R., 74).

The contracts, designated Order No. 2042 and Order No. 2049, respectively, for both sales were specifically designated C. and F. contracts (R., 42 and 72); and the respondent agreed that it would obtain and pay for on its own account, insurance to protect both shipments (R., 113, 116, 120, 126 and 128). Neither contract com-

municated to petitioner contained any requirement that the lumber be shipped below deck. Payment for the lumber was provided to be made by respondent as follows:

90% of the F. O. B. value of the lumber at the mill in Brazil, by means of a letter of credit to be issued prior to shipment of the lumber; and 10% of such value to be paid to petitioner within ten days following the arrival of the lumber at New York (R., 42, 43, 72, 113, 116, 126 and 128).

The agreed price for both lots of lumber were as follows:

The first lot of 500,000 feet

Kiln Dried	*Naturally Dried*
140,000 feet at $40.00 per 1,000 feet (R., 74).	360,000 feet at $38.00 per 1,000 feet

The second lot of 250,000 feet

All *naturally dried* at $40.00 per 1,000 feet (R., 74).

The above prices included estimated freight charges, which respondent agreed to pay for the account of petitioner (R., 43, 72 and 115). In the case of the first lot of 500,000 feet of lumber, the estimated freight charge at the time the order was placed was $12.00 feet (R. 43). Accordingly, petitioner's price, based on the estimated freight charge, was $28.00 per 1,000 feet for that part of the lot of 500,000 feet which consisted of kiln dried lumber; and $26.00 per 1,000 feet for that part of such shipment which consisted of naturally dried lumber. Both of these prices were exclusive of the freight charges, but the estimated freight charge of $12.00 per 1,000 feet was added in fixing the gross prices of $40.00 per 1,000 feet for kiln dried lumber and $38.00 per 1,000 feet for natural or air dried lumber.

At the time the order for the additional lot of 250,000 feet was made, the freight rate had increased from $12.00 per 1,000 feet to $14.16 per 1,000 feet (R., 61); and it was agreed that the petitioner's price for that lot, which consisted entirely of naturally dried lumber, should be, exclusive of the freight charges, the same, that is, $26.00 per 1,000 feet, as petitioner's price for the naturally dried lumber contained in the first lot, but that respondent should pay the increased estimated freight rate of $14.16 per 1,000 feet (R., 72). Accordingly, the price of the lot of 250,000 feet was fixed at $40.00 per 1,000 feet.

The contracts were negotiated by Brazilian Minerals and Timbers Corp., which acted as intermediary between the parties. The only compensation to such intermediary was a commission of 10% of the F. O. B. value of the lumber which respondent agreed to pay (R., 114, 117, 127 and 128).

Neither contract provided which party should bear the cost of any increase in the freight rate, over and above the rate estimated at the times the contracts were made, and that question was left open The contracts recited a single price to cover the petitioner's price and the estimated freight rate, and that price was an entire price only in the sense that it included an estimate of freight charges.

When the first lot of 500,000 feet of lumber was shipped, the freight rate had increased from $12.00 per 1,000 feet to $16.99 per 1,000 feet (R., 80). Petitioner requested that respondent pay the increased freight, without any diminution in the price of $28.00 per 1,000 feet for kiln dried lumber and $26.00 per 1,000 feet for naturally dried lumber, to be paid to petitioner. Respondent refused to absorb the increase of $4.99 per 1,000 feet in the freight rate, and in paying for the shipment of the first lot of 500,000 feet deducted the increased freight rate from the amount paid to petitioner, thereby diminishing the amount paid to petitioner by $4.99 per 1,000 feet. The

total amount thus deducted from the amount paid by respondent to petitioner for the shipment of 500,000 feet was $2,490.00.

In addition to making such deduction, respondent refused to pay to petitioner the amount of $1,078.98, representing the 10% balance due to petitioner on the shipment of the first lot of 500,000 feet, after deducting the increased freight rate paid by respondent. This refusal was based on the non-delivery by petitioner of the additional lot of 250,000 feet of lumber. Respondent claimed that it had been damaged by petitioner's failure to make the additional shipment, and that the said sum of $1,078.98 would be applied by respondent to its damages.

The second lot of 250,000 feet was never shipped to respondent. However, petitioner tendered delivery of the second lot to a carrier for shipment to respondent above deck, but respondent, relying on its orders Nos. 2271 and 2330, sent to the intermediary but never communicated to petitioner (R., 116, 117, 128 and 129), took the position that the lumber had to be shipped below deck (R., 84). As a result, the lumber was never placed on shipboard, and no other shipping arrangements were available. Accordingly, petitioner treated the contract for the second lot as having been cancelled (R., 86).

This action was instituted by petitioner to recover from respondent the aforesaid amount of $2,490.00 representing the additional freight charges on the shipment of the first lot of 500,000 feet of lumber, deducted by respondent from the amount payable to petitioner; and for the sum of $1,078.98, representing the 10% balance due to petitioner on such shipment (R., 3, 4 and 5). Brazilian Mineral and Timbers Corp., the intermediary, was named as a defendant originally, but the suit against it was thereafter dismissed on petitioner's motion.

The respondent interposed a counter-claim for damages for petitioner's failure to ship the additional lot of 250,000 feet of lumber (R., 10-13).

The respondent then moved for summary judgment on its counter-claim, and for summary judgment dismissing petitioner's complaint (R., 102 and 103). Petitioner made a cross-motion for judgment for the relief demanded in the complaint, and dismissing respondent's counterclaim (R., 148).

The Courts below have held as follows:

With respect to the first lot of 500,000 feet of lumber:

1. That the prices for the lumber comprising the first lot of 500,000 feet were entire prices which included freight charges agreed upon by the parties (R., 153); and that the respondent was not liable for any increase in the freight rate, and was entitled to deduct from the purchase price the increased freight rates paid by it. Accordingly, petitioner's claim for $2,490.00, representing increased freight rates which petitioner contended should be borne by respondent was rejected.

2. That the respondent was entitled to offset the balance of 10% due on this shipment, amounting to $1,078.98, against damages suffered by it as the result of petitioner's failure to deliver the additional lot of 250,000 feet of lumber (R., 171).

It should be noted that the balance of 10% due on this shipment, in the amount of $1,078.98, was admittedly due by respondent to petitioner. Respondent conceded that fact; and the lower courts have recognized and accepted it as a fact.

With respect to the second lot of 250,000 feet of lumber:

1. That the petitioner had breached the contract relating to that lot of lumber (R., 153).

2. That respondent was entitled to damages amounting to $5,282.50, against which should be offset the 10% balance due petitioner on the first shipment, in the amount of $1,078.98, resulting in a balance of damages due to respondent of $4,253.52, plus interest thereon from the 31st day of January, 1941 (R., 171).

The total of the judgment rendered in respondent's favor was $5,057.34, which amount included the costs of action.

The formula used by the District Court and approved by the Circuit Court of Appeals in computing respondent's damages was as follows:

F.O.B. price in Brazil, stated by petitioner in letter dated January 9, 1941—(R., 86)	
250,000 feet at $28.00 per 1,000 feet.....	$ 7,000.00
Freight rate quoted by Lloyd Brasiliero Steamship Co., as stated in the same letter—(R., 86)	
250,000 feet at $33.13 per 1,000 feet.....	8,282.50
	$15,282.50
Less agreed contract price of 250,000 feet at $40.00 per 1,000 feet (including estimated freight charges of $14.00 per 1,000').....	10,000.00
Total damages	$ 5,282.50
Less offset	1,078.98
Balance of damages due respondent (R., 154)	$ 4,203.52

Specifications of Error

The Court below erred in summarily disposing of the disputed issues of damage, on respondent's motion for summary judgment, in direct violation of the specific wording of Rule 56 of the Rules of Civil Procedure, and in direct violation of the controlling decision of this Court in

Sartor, et al. v. *Arkansas Natural Gas Co.*, 321 U. S. 620, and in spite of evidence in the record contrary to respondent's claim.

The Court below erred in failing to grant summary judgment to petitioner for an amount which respondent admitted was due from it to petitioner.

The Court below erred in holding that petitioner was obligated under the contract for 250,000 feet of lumber to ship such lumber below deck, and that its failure to do so was a breach of the contract; because such contract contained no requirement that the lumber be shipped below deck.

Reasons for Granting Writ

1. The Circuit Court of Appeals has sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings, by affirming the decision of a lower court granting a motion for summary judgment, although the lower court exercised powers denied to it by the Federal Rules of Civil Procedure; as the result of which petitioner has been unjustly mulcted in damages, and has been unjustly deprived of damages to which it is entitled; and a precedent improperly magnifying the power of a District Judge has been created. Accordingly, the action of the Circuit Court of Appeals calls for the exercise of this Court's power of supervision.

2. The Circuit Court of Appeals has decided important questions of law in a way probably in conflict with applicable decisions of this Court.

3. The Circuit Court of Appeals has decided important questions of law in a way probably untenable and in conflict with the weight of authority.

Respectfully submitted,

ALBERT M. PARKER,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioner has submitted a statement of the facts and also statements as to the opinions below, jurisdiction, questions presented, and reasons for granting of the writ in the foregoing petition. Additional facts will be stated in the brief herewith presented.

POINT I

Rule 56 of the Federal Rules of Civil Procedure denies power to a District Judge to grant summary judgment where the amount of damages is in dispute; where the record contains statements which permit of more than one inference with respect to the principal factors underlying the computation of damages; where a jury would be at liberty to disbelieve the evidence forming the basis of the decision; and where, if the counterclaim had not been contested, such District Judge would have been required by Rule 55 (b) (2) of said Rules to call a jury on the issue of damages.

Rule 56(c) of the Rules of Civil Procedure reads in part as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file,

> together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In the case of *Sartor, et al* v. *Arkansas Natural Gas Co.*, 321 U. S. 620, Mr. Justice Jackson, writing for the majority of this Court, said at pages 623 and 624:

> "Where the undisputed facts leave the existence of a cause of action depending on questions of damage which the rule has reserved from the summary judgment process, *it is doubtful whether summary judgment is warranted on any showing. But at least a summary disposition of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.*" (Emphasis supplied.)

The issue in that case related to the market value of natural gas at the wellhead. The plaintiffs were the owners of lands in Louisiana which had been leased by them to the defendant for natural gas development. The lease provided that the plaintiffs should receive "1/8th of the value of such gas calculated at the rate of market price and no less than 3¢ per 1,000 cu. ft. corrected to 2 lbs. above atmospheric pressure." For many years the lessee made settlement at the 3¢ rate. Suit was brought by the plaintiff on the contention that during certain years in which the lease was effective, the market price was considerably above 3¢. Following a number of proceedings, a motion was made by defendant for summary judgment under Rule 56 of the Federal Rules of Civil Procedure to dismiss plaintiff's action with respect to the fees claimed by it for natural gas produced prior to March 20, 1930, on the ground that it did not appear from the record that the plaintiff had suffered any damages, because the market value of natural gas at the wellhead during such years had been established at 3¢.

The majority of the Court found that although the weight of the evidence might be found by a trial court to be with the defendant, the District Court did not have the right, on a motion for summary judgment, to determine that plaintiff had not been damaged; and that the District Court could not withdraw defendant's witnesses from cross-examination, and could not pass upon the credibility and the weight to be given to their opinions, without requiring a trial in the regular manner.

The *Sartor* case thus lays down the rule, which has binding force on the respective Circuit Courts of Appeal throughout the country, that a District Court does not have the right under Rule 56 of the Federal Rules of Civil Procedure to make a summary disposition of disputed issues of damage, unless such disposition shall be based upon evidence which a jury would not be at liberty to disbelieve, and which would require a directed verdict for the moving party.

The dissenting opinion of Mr. Chief Justice Stone, in the *Sartor* case, was based upon the ground that there was in the case no evidence to show that the plaintiff had suffered damages. He held, accordingly, that the amount of damages was not in controversy, and that the Court was not precluded from giving summary judgment for the defendant. In reaching his decision, however, Mr. Chief Justice Stone recognized that Rule 56(c) of the Rules of Civil Procedure, excludes from the summary judgment procedure any issue as to the amount of damages, where the amount of damages is in dispute (321 U. S. 620, at page 629).

It is respectfully submitted that the decision of the Circuit Court of Appeals in the instant case is, on the facts of this case, clearly in conflict with the majority decision in the *Sartor* case; and also with the rule recognized in the dissenting opinion in that case.

The record in the instant case reveals the following evidence, presented in affidavit and documentary form, as to the bases of damages claimed by defendant:

1. The so-called admission by plaintiff of the market value of lumber in Brazil at the time of the alleged breach of the contract, contained in plaintiff's letter of January 9, 1941 (R., 86). The exact excerpt from that letter, relied upon, both by the District Court and by the Circuit Court of Appeals, reads as follows:

> "Our F. O. B. price is on the basis of $28.00 per 1,000 square feet."

2. The so-called admission of the freight rate on shipments from Brazil to New York, contained in the same letter of plaintiff dated January 9, 1941 (R., 86).

The above mentioned evidence was the only evidence considered by the lower courts in fixing the amount of damages awarded to the defendant. The majority opinion of the Circuit Court of Appeals emphasized that "no explanation or contradiction of this price (the alleged market value of the lumber) was made by plaintiff in its papers on the original motion" (R., 195, 196), as proof that the figure determined by it to be the market value of the lumber was not subject to attack.

However, there was other evidence in the record which would clearly permit an inference that the market price of lumber at the time of the breach was less than the figure determined by the lower courts. That evidence was completely ignored by the lower courts, both of which drew the inferences upon which their decisions were based from the evidence favorable to defendant, without regard to evidence supporting the plaintiff's position. The additional evidence referred to is as follows:

3. The statement contained in letter dated November 28, 1940, from Brazilian Minerals and Timbers Corp., the intermediary in the transaction, to the petitioner, to the effect that a firm in Parana, Brazil, was closing shipments of pine (the same kind of lumber which petitioner agreed to sell to respondent) "on the basis of $22.00 per 1,000′ F. O. B. Paranagua, giving to understand that for quantities of 200,000′ or more the F. O. B. price can be reduced" (R., 66).

Although this letter was written on November 28, 1940, and the alleged breach was found to have occurred as of January 31, 1941, the statement is some evidence that the market price on the date of the alleged breach might have been less than $28.00 per 1,000 feet, as found by the lower courts. Of course, the evidence is by no means conclusive, and petitioner does not assert that it is. In any event, however, it is ground for an inference that the market value of lumber on the date of the alleged breach was less than $28.00 per 1,000 feet; and a jury would be entitled to draw such an inference. Further than that, it is clearly indicative of the fact that the evidence relied upon by the lower courts was not evidence 'which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party'.

4. The statement contained in letter dated January 9, 1941, from Manoel Jacinto Ferreira, to Mr. Raul Alvarez of Brazilian Minerals & Timbers Corp., reading—

> "I do not understand how Curityba (a competitor of plaintiff) is selling pine to your country on bases which permit the payment of such freight rates" ($33.13 per 1000′) (R., 89).

It will be noted that this letter is dated on the same date as the plaintiff's letter of January 9, upon which the lower courts have relied in determing damages awarded to defendant. The writer of the letter was con-

nected with the petitioner, and the addressee was an officer of the Brazilian Minerals and Timbers Corp., to which concern the petitioner's letter of January 9 containing the alleged admission of market value had been directed.

The statement quoted clearly indicates that about the time of the alleged breach, Brazilian pine was being sold to concerns in this country by firms other than petitioner, on a better basis than petitioner could afford to sell it; and clearly justifies an inference that the petitioner's F. O. B. price, was its own price to its customers, and not the current market price of the lumber. Accordingly, the finding by the lower courts that the statement in plaintiff's letter of January 9, 1941, of its F. O. B. price was a "clear cut admission" of the market price is unquestionably erroneous. As Mr. Justice Frank said in his dissenting opinion (R., 200), "the letter did not discuss or intimate anything whatever as to the market price in Brazil of the lumber itself".

5. The statement contained in letter from Raul Alvarez to Manoel Jacinto Ferreira, dated January 16, 1941, reading:

> "It appears unbelieveable that the Lloyd should have raised the freight charges for pine to $33 per 1,000', *which is practically twice the price of the lumber at the sawmills in Parana*" (R., 91). (Emphasis supplied.)

This statement would, it is submitted, permit a jury to draw the inference that the market price of Brazilian pine, during the month of January 1941, when the alleged breach occurred, was between $16.00 and $17.00 per 1,000 feet. It is not contended that such figure represents the market price, but the important point is that such an inference can be drawn from the evidence in the record of this case. Accordingly, the inference actually drawn by the lower courts was not one "which a jury

would not be at liberty to disbelieve and which would require a directed verdict for the moving party".

In view of the evidence contained in the record, as outlined on the question of the market value of lumber in Brazil, at the time of the alleged breach of contract, it is submitted that the Circuit Court of Appeals has sanctioned the assumption by a District Judge of power denied to such District Judge; and that the summary judgment awarded to the defendant was not based upon evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party, and that the sanctioning of the procedure followed constitutes an unfortunate precedent improperly magnifying the power of a District Judge.

It is further submitted that the instant case also satisfies the requirements stated in the dissenting opinion of Mr. Justice Stone in the *Sartor* case, that the record must contain some evidence in favor of the defeated party, to justify a reversal of a decision granting summary judgment against such party. It is true that Mr. Justice Stone held that the party who seeks to upset a summary judgment must show that it tendered "probative evidence" to challenge the evidence submitted by the moving party. If the evidence which has been here outlined to show that the lower courts were not warranted in drawing the inference upon which their decisions were based, is not, strictly speaking, probative evidence; the same may be said of the evidence upon which the decisions of the lower courts were based. Certainly, a statement that the petitioner's F. O. B. price for lumber was $28.00 per 1,000 feet, while it may be some evidence of the market value of the lumber is not, in and of itself, probative of that fact. Such evidence has no greater weight than the cumulative evidence furnished by the statements in the above mentioned letters.

Indeed, in the strictest sense of the word "probative", there was no evidence on either side to justify the lower court in making summary disposition of the controversy; and the disputed issue of damages should clearly have been referred for trial, in the regular manner.

The patent injustice to the petitioner, resulting from the decision of the Circuit Court of Appeals is emphasized by the fact that, if the petitioner had defaulted in pleading to the counterclaim interposed by the defendant, the District Court could not have awarded damages to the respondent, without the aid of a jury on that issue (Rule 55 (b) (2)). Accordingly, by answering the counterclaim and by contesting respondent's motion for summary judgment, the petitioner has been placed in a worse position than if it had defaulted. Such a result may hardly be characterized as fair or equitable.

With respect to the determination of the lower courts that the freight rate at the time of the breach was $33.13 per 1,000 feet, it is submitted that petitioner's statement that such figure represented the freight rate quoted to it by one steamship line operating from Brazil to the United States, would hardly justify a finding that such amount was the only current freight rate at the time in question. In any event, this item was merely one of two essential items forming the basis for the damages, if any, to be awarded to the respondent; and even if it may be assumed that the current freight rate actually was $33.13 per 1,000 feet, the burden of the respondent to prove the market value of the lumber at the time of the breach was not met by respondent. Hence, respondent failed to prove one of the essential ingredients of its counterclaim for damages.

The fact that the petitioner did not marshal and present to the Court any evidence bearing upon the market value of the lumber at the time of the alleged breach is not a ground for the granting of summary judgment in favor of the respondent. The rule is well established, that a party seeking

damages has the burden of proving that he has suffered a loss, and of showing to what extent he has actually been damaged. 1 *Sedgwick, Damages* (9th Ed. 1913), Section 170. *Oklahoma Natural Gas Corp.* v. *Municipal Gas Co. of Muskogee,* 113 F. 2d 308 (C. C. A. 10th); *Burke, Kuipers and Mahoney* v. *Dallas Dispatch Co.,* 253 A. D. (New York) 206. It would seem to require no argument that, where the party seeking damages offers only incomplete and inconclusive evidence to sustain its claims, there is no obligation on the adverse party to furnish more cogent evidence to the contrary.

POINT II

In the state of the record in the lower Court, respondent's motion for summary judgment should have been denied; and petitioner's motion for summary judgment for the balance of the purchase price of the first shipment of lumber, which balance was admittedly due to petitioner in the amount claimed, should have been granted.

The reasons why respondent's motion for summary judgment should have been denied have been set forth under Point I. If those reasons shall be deemed sufficient to induce this Court to reverse the decision of the Circuit Court of Appeals, which affirmed the decision of the lower court granting respondent's motion for summary judgment; such reversal will require a holding that petitioner's motion for summary judgment for the balance due to it on the first shipment of lumber be granted (Rule 56 (d), Federal Rules of Civil Procedure).

POINT III

The contract made between the petitioner and the respondent was not breached by petitioner; because the petitioner was not bound by the terms of an order given by respondent to an intermediary in the transaction, but never communicated to the petitioner by such intermediary; and because the tender by the petitioner of the lumber ordered by respondent, to a carrier, for shipment on the deck, constituted a full performance by the petitioner of the contract made between the petitioner and the respondent.

The evidence in the record shows that the petitioner received from Brazilian Minerals and Timbers Corp., the intermediary in the transaction, order No. 2049, for the second lot of 250,000 feet of lumber (R., 72). It appears that the intermediary received from the respondent a confirmatory order, bearing No. 2330 (R., 128 and 129), but there is no evidence anywhere in the record that order No. 2330 was communicated to the petitioner. Some argument was made in the lower courts by respondent that petitioner was bound by the confirmatory order bearing No. 2330, because the intermediary was petitioner's agent. The District Court accepted that argument, but the argument was not passed upon by the Circuit Court of Appeals which considered the question unimportant to its decision.

The only evidence in the record which bears upon the legal relationship of the intermediary to the respondent and the petitioner consists of the following:

1. The statement contained in the affidavit of Julius Stulman, President of the respondent, which reads:

> "Although Mr. Alvarez died some time ago, we were fortunate in obtaining from Brazilian, its file of correspondence with Madeirense" (R., 109).

2. The agreement by the respondent to pay to the intermediary a commission of 10% of the F. O. B. value of the lumber purchased by respondent from petitioner (R., 115, 117, 127 and 129).

We submit that, on the evidence outlined, the intermediary was, in fact, the agent of the respondent; and that the petitioner was not, therefore, bound by the respondent's order bearing No. 2330, but that petitioner's obligations were limited by the terms of order No. 2049, received by the petitioner from the intermediary.

As appears from order No. 2049 (R., 72 and 73), there was no requirement that the second lot of 250,000 feet should be shipped below deck.

It follows, accordingly, that when petitioner tendered to the carrier the lumber called for by order No. 2049, for shipment on deck (R., 84), the petitioner discharged its obligations under the order which was specifically designated a C. and F. contract, and fully performed its contract. *Thames & Mersey Ins. Co.* v. *U. S.*, 237 U. S. 19; *Seaver* v. *Lindsay Light Co.*, 233 N. Y. 273.

The majority opinion of the Circuit Court of Appeals makes the point that, even if the intermediary should not be deemed the agent of the petitioner, the contract made by petitioner would, in any event, require that the lumber be shipped below deck, because such contract calls for lumber "naturally dried" and for "clean lumber, perfectly dried". The Court added that petitioner's cable informing respondent that the second lot would have to be shipped on deck indicates that petitioner knew it did not have the right to do so.

We submit that the Circuit Court of Appeals was not warranted in drawing these conclusions for the following reasons:

1. This Court may take judicial notice of the well known fact that merchandise which may suffer water dam-

age is often shipped on deck; and that such shipments are protected from damage by water by being well covered with water resisting materials; just as it will take judicial notice of the fact that merchandise shipped on deck may suffer water damage if not properly protected.

2. The sending of a cable by the petitioner, informing respondent that the lumber would have to be shipped on deck can be construed as a friendly act on the part of the petitioner toward the respondent, as well as an act indicating knowledge on the part of the petitioner that it did not have the right to ship the lumber on deck. Undoubtedly, both parties would have preferred that the lumber be shipped below deck; but the controlling consideration is the contract itself, which contains no such requirement.

POINT IV

The application for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT M. PARKER,
of Counsel, for Petitioner.

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BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States.

The petition concerns itself with no question of substantial interest. The decision of the Circuit Court of Appeals is not in any way in conflict with applicable decisions of this court or with the weight of authority. Petitioner, at the time the original motion was argued, had already waived its right to a jury trial and, therefore, had no right to have a jury assess damages nor did it by affidavit request a jury trial on the issue of damages or raise any controversial factual issue. The purported issues of fact now being urged were raised after the original motion for summary judgment had been decided and even then, the statements alluded to as indicating a factual

conflict are either absent from the record or are statements of counsel made for the first time in his affidavit on the motion for reargument, without counsel asserting that he had any personal knowledge of the facts or making any showing indicating that he might have had personal knowledge of the facts. The statements in the affidavit on the motion for reargument even if proper are therefore of no probative value.

The Opinions Below.

The United States District Court, Southern District of New York, handed down its opinion granting respondent motion for summary judgment and denying petitioner's cross-motion for summary judgment on December 20, 1943 (R. 149-151). Its opinion on petitioner's motion for reargument is dated February 7, 1944 (R. 170, 171). Both opinions are unreported. The opinion of the Circuit Court of Appeals, Second Circuit handed down on January 9, 1945 is reported at 147 F. 2d, 399 and is printed in the record at pages 185 to 202.

Statement.

Respondent, a lumber dealer at Brooklyn, New York, in October, 1940, ordered 450,000 square feet of Brazilian pine to be shipped by petitioner from Brazil to New York (R. 111-122). Brazilian Mineral and Timbers Corporation, a corporation with its offices in Manhattan, New York City (hereinafter referred to as Brazilian) solicited the order of respondent for petitioner's benefit and having obtained a commitment from respondent in terms acceptable to petitioner, communicated the commitment by cable and letter to petitioner and received its acceptance. This order was subsequently increased to 500,000 square feet of which 160,000 feet were kiln dried lumber at $40 per thousand, C. & F. New York, and 340,000 feet were

air dried lumber at $38.00 per thousand feet, C. & F. New York (R. 114, 117, 127). Payment was to be made by letter of credit for 90% of the FOB value, the balance of 10% after arrival of the shipment in New York and the freight charges estimated at $12 per thousand feet were to be paid in New York by respondent for petitioner's account and deducted from the total price. Although shipment was to be made immediately, petitioner delayed, and subsequently insisted that Brazilian procure from respondent an order for an additional 250,000 feet of air-dried lumber in order to make up an entire shipload and thus ensure delivery of the first 500,000 feet. The additional 250,000 feet of air-dried lumber was to be at $40 C. & F. New York to cover the increase of $2.00 per thousand square feet in the freight rate. Respondent in order to ensure delivery of the original 500,000 feet, ordered the additional 250,000 feet at the increased price (R. 62, 65, 66, 70, 72, 74, 77. 80, 81, 85, 90, 107, 128-132). The *modus operandi* followed by Brazilian was to procure informal commitments by letter, cable or orally between petitioner and respondent and to follow that up by procuring respondent's formal order on its order form and then by procuring petitioner's formal confirmation on Brazilian's order form. The formal orders upon which plaintiff relies appear from Exhibits 2 (R. 42, 43), 3 (R. 46), 13 (R. 56), 18 (R. 60), 25 (R. 72; 73). Respondent's order forms appear as Exhibits B (R. 112-114), D (R. 116, 117), M (R. 126, 127), N (R. 128, 129).

As each order was placed, respondent procured a letter of credit in favor of petitioner for 90% of the FOB value, the FOB value being ascertained by deducting from the total gross price the estimated cost of freight (R. 118-125, 131-143). When the freight rate increased, the amount of the letter of credit was reduced *pro tanto* in order to allow respondent to retain here a sum equal to the amount which would have to be paid to the steamship

company. It is incorrect to state that "Neither contract provided which party should bear the cost of any increase in the freight rate, * * *" (petition, p. 5), since these were C. & F. New York prices and the seller was committed to delivery at the contract price and to absorb any freight increase. It likewise would have had the benefit of any freight decrease. Both courts below have so found (R. p. 153; R. 189, 192, 193).

Petitioner's order form for the 500,000 feet provided that the lumber was to be "Clean lumber, *perfectly dry*, free from knots and from any other defects due to kiln drying or natural drying" (R. 43); for the 250,000 feet, "Clean lumber, *perfectly dried*, free from knots or any other defect" (R. 73). (Emphasis ours.) Both orders recited "Sold to: Stulman-Emrick Lumber Co. Inc., Brooklyn, New York". Respondent's order forms provided "All lumber shipped by vessel must be stowed below deck. * * * Stock must be thoroughly dry and well manufactured in every respect" (R. 116, 117, 128, 129).

Before shipping the 500,000 feet, petitioner sought to pass the increase on to respondent and when respondent refused to be liable therefor, petitioner acknowledged that under its contract, it was required to absorb the increase in freight rate, agreed to do so and requested respondent to change the letters of credit and reduce the amount thereof so that respondent could retain in New York City a sum equivalent to the aggregate freight charge at a freight rate of $16.98 per thousand feet (R. 58, 59, 63, 70, 71, 80-84, 93, 118-122, 131-143). On receipt of these corrected letters of credit, petitioner cabled that it could ship the 500,000 feet under deck but could only ship the 250,000 feet on deck and would only ship the 250,000 feet on deck "at buyer's responsibility any deterioration" (R. 84). Respondent, having refused to accept responsibility for deterioration of the lumber which petitioner proposed to ship on deck (R. 108), Brazilian cabled "PINE ON DECK ABSOLUTELY UNACCEPTABLE. SHIP

ONLY 2042 IN THE HOLD" (R. 84, 85). Had the lumber been shipped on deck, it would have completely deteriorated by the time it arrived here (R. 85, 88, 108). Petitioner thereafter refused to ship the 250,000 feet and requested Brazilian to procure respondent's consent to a cancellation of the commitment for this lumber, unless respondent would agree to purchase on an F.O.B. basis of $28 per thousand square feet and agree to pay the freight rate applicable at time of shipment, which freight rate was then quoted at $33.13 per thousand square feet (R. 86, 89, *et seq.*).

Neither party demanded a trial by jury and *petitioner's right to trial by jury as a matter of right has been waived* (Rule 38 [d] Rules of Civil Procedure). The moving affidavit of respondent's counsel asserted:

> "Mr. Ring, (petitioner's counsel) on June 4, 1943, told me that he intended trying this case on the correspondence; that he had no witnesses to produce other than the correspondence and the deposition of my client which he proposed to take as soon as issue was joined. No depositions have been taken in this case. It is my opinion from a study of the various documents contained in the demand and in the moving papers that the contentions of both parties can be fully and completely disposed of on the basis of these documents; that no oral testimony is required and that therefore, no trial is required" (R. 147).

This statement was not controverted. In fact, petitioner served no affidavit in opposition to respondent's moving papers when the motion for summary judgment was originally brought on. Instead, it served merely a cross-notice of motion for summary judgment reciting that petitioner was relying on respondent's moving papers (R. 148). Petitioner thereby adopted this statement. Further facts will be discussed under the respective point headings.

POINT I.

The question of damages was not in dispute at the time of the submission of the original motion for summary judgment. Even if it were in dispute, the result would necessarily have had to be the same.

On the original motion, petitioner gave no concern at all to the question of damages. It addressed itself solely to the question of liability. It was only after the motions had been decided adversely to petitioner that it sought by motion for reargument to have the court reconsider the question of damages, and even then its position was not that the parties were at issue on the question of damage, but merely that "plaintiff has made no statement of market value" (R. 164) and that " * * * defendant never paid the freight and has never sustained the damage" (R. 165; see also R. 172-176, 178).

The record before this court is barren of any assertion that petitioner desired an opportunity to cross-examine respondent's president on his statement of market value or was in any way in dispute with its own statement of market value. The majority opinion in the Circuit Court points out that "It seems not to be doubted that plaintiff has never had any intention of attacking its own figures; at the very least, there has certainly been no attempt, or even suggestion of an attempt, to 'condescend upon particulars' as the procedure requires" (R. 196). It also points out that there was no necessity for cross-examination of respondent's president since the District Court relied upon petitioner's admissions and not the statement of market value offered by respondent's president (R. 193-196).

As the record was presented to the District Court, it was established without dispute that petitioner had agreed to sell and deliver 250,000 feet of lumber at $40 per thou-

sand feet C. & F. New York or an entire price of $10,000; that petitioner had breached its agreement in January, 1941 and that the breach was completed by January 31, 1941 (R. 171) and that in January, 1941, and thereafter, petitioner made statements as follows: The freight rate was $33.13 per one thousand sq. ft. and "Our FOB price is on the basis of $28 per one thousand sq. ft." (on January 9, 1941) (R. 86). Ferreira, petitioner's president, wrote Alvarez of Brazilian on the same date to the same effect (R. 88, 89). On January 22, 1941, it wrote "Regarding the 250,000 feet, please proceed in accordance with our letter of January 9 as the Lloyd continues for the meantime to maintain the freight rate of $15 per 40 cubic feet * * * " (R. 94). [This is equivalent to $33.13 per one thousand sq. ft. (R. 86)]. To the same effect see Exhibit 43, item 4 (R. 95) dated January 23, 1941 and Exhibit 48 (R. 101) at folios 302, 303, wherein petitioner refers to two other firms who shipped on a basis of a freight rate of $33.13 per thousand sq. ft. or $15 per 40 cubic feet. These were admissions against interest,—one of the highest forms of proof available in law. True, the statements were not conclusive. Petitioner might have submitted an affidavit in which it offered an explanation thereof; but no such offer was made. If it intended to contest any factual issue it should have presented in affidavit form facts showing that there was a substantial issue. Its failure so to do warranted the court in accepting as true respondent's affidavits and the admissions contained in the various letters (*Engl* v. *Aetna Life Ins. Co.*, 139 F. 2d 469; *Geller* v. *Transamerica Corp.*, 53 F. Supp. 625; *Rudolph* v. *John Hancock Mutual Life Insurance Co.*, 251 N. Y. 208, 213).

See also *Harrison* v. *United States*, 42 F. 2d 736, where the court at page 737 stated of such an admission:

> "Since appellant was a party to the action, this statement not only impeached him but it constituted

substantive evidence against him. Jones Commentaries on Evidence (6th Ed.) §§2412, 2414."

The Circuit Court said "That this was a definite and clear-cut admission, made at or about the time of the breach, seems clear" (R. 195). With this proof, and nothing to contradict it, how can it be said that there was an issue of fact as to market value or as to the item of damage. (*Fox* v. *Johnson Winsatt Inc.*, 127 F. 2d 729; Shientag, *J.*, 4 Fordham Law Review, 180, 208, 209.)

Petitioner's assertion that it might be found that there was evidence in the record that the market price of lumber at the time of the breach was less than the figure determined by the District Court is without foundation for: (a) The statement referred to in the November 28, 1940 letter from Brazilian (item 3, p. 14, Petitioner's brief) has no probative value since it was a statement made by one not a party to the action, was obviously based on hearsay (*Boerner* v. *U. S.*, 26 F. Supp. 769) and was anywheres from six weeks to two months before the date of the breach; (b) The statement (item 4, p. 14, Petitioner's brief) in the letter of January 9, 1941 from petitioner's president to Alvarez, if it were a statement of market value would be a self-serving declaration. Actually, it merely expresses an inability to understand how a competitor was able to sell lumber with a freight rate of $33.13 per thousand feet. (c) The statement in Alvarez's letter of January 16, 1941 (Item 5, at p. 15 of Petitioner's brief) was made by one not a party, is not binding on respondent and again merely expresses incredibility that the freight rate had gone up so much. The fact remains that the freight rate did go up to $33.13 per thousand square feet and nobody disputes that.

However, assuming that all of these statements referred to at pages 14 and 16 of petitioner's brief had some probative value, the ruling must necessarily have been the

same. Petitioner has waived its right to a jury trial here, a fact undoubtedly overlooked by the learned dissenting Judge below. The court was not obliged to impanel a jury to assess damages. The exception in Rule 56 (c) Rules of Civil Procedure, applies only where a jury has been demanded and the party has an absolute right to have the jury pass upon damages in dispute, or else where the court of its own volition impanels a jury to aid it in determining the issue of damage (Rule 39 [b] [c], Rules of Civil Procedure). Petitioner made no request on the original motion for a jury trial on the question of damages. At that time it was content to adopt the statement contained in our moving affidavit (R. 147) that the correspondence constituted the full proof on both sides. The District Court had the right to assume that counsel for both parties had submitted to the court all proof available or which they deemed necessary.

The District Court was, therefore, in the same situation as if there had been a trial before it without a jury and both parties had rested and moved for judgment.

In *Harrison* v. *United States, supra,* where the plaintiff sought to recover disability benefits, the government offered in evidence a "Declaration of Soldier" in which he answered "No" to the inquiry as to whether on a certain day he was suffering from the effects of any wound, injury or disease. The court pointing out that he made no attempt to explain such statement, stated that his claim of disability was in irreconcilable conflict with the statement in the "Declaration of Soldier" offered by the defendant and stated at page 737:

> "It follows that the findings of the trial judge were supported by substantial evidence. In an action at law, alleged errors in the findings of the trial court are not reviewable here, when such findings are supported by substantial evidence. *Dooley*

v. *Pease*, 180 U. S. 126, 131, 132, 21 S. Ct. 329, 45 L. Ed. 457; *Howbert* v. *Penrose* (C. C. A. 10) 38 F. (2d) 577, 578; *Wabash Ry. Co.* v. *So. Daviess County Drainage Dist.* (C. C. A. 8) 12 F. (2d) 909, 913, 914. In the trial of an action at law without a jury, the decision of a court upon the weight of conflicting evidence is not reviewable on appeal. *Busch* v. *Stromberg-Carlson Tel. Mfg. Co.* (C. C. A. 8) 217 F. 328, 330; *People's Bank* v. *International Finance Corp.* (C. C. A. 4) 30 F. (2d) 46, 47; *Phoenix Ins. Co.* v. *Bakovic* (C. C. A. 9) 2 F. (2d) 857, *Lehigh Valley R.R. Co.* v. *State of Russia* (C. C. A. 2) 21 F. (2d) 406, 408."

Sartor v. *Arkansas Natural Gas Company*, 321 U. S. 620, is not at all in conflict with the ruling below. If it were, the court could never assess damages on a motion for summary judgment without a jury. In the *Sartor* case, there had been several trials and various other proceedings. The issue was whether the market value of gas was in excess of 3¢ per one thousand cubic feet. The defendant had paid 3¢ for a number of years and suit was brought to recover the difference between the amount paid and received and the alleged market value. The evidence offered on market value was solely that of officers of the defendant or others whose interest with respect to the subject matter of the litigation were similar to that of the defendant, all of whom had given like testimony at a previous trial of the case wherein a jury had found contrary to their testimony. There, the issue of market value was dependent on statements of the moving party. Here, it was dependent on statements of the opposing party; which statements by their adoption on the cross motion were reiterated. In the *Sartor* case, this court held that opinion evidence of that nature "where the undisputed facts leave the existence of a cause of action depending upon ques-

tions of damage * * * " should not be accepted summarily, but that a jury should pass on the issue. Presumably, the parties had a right to a trial by jury. Here, the existence of the cause of action does not depend on the question of damage. Here, even if defendant established no damage, it would be entitled to a judgment adjudicating the breach of contract and an award of nominal damage. But what is more important is that the evidence in this record is such that even if there were a jury trial, a jury would not be at liberty to disbelieve the evidence which the court has believed and in fact, the District Court would have been required to direct a verdict. The Circuit Court so found (R. 196. 197).

The assertion that we have not sustained the burden of proving our damages is answered by the authorities cited at page 193 of the record. Whether the point of delivery be New York or Brazil is immaterial. The result is the same.

POINT II.

Respondent did not admit that there was any balance due the petitioner.

The theory of petitioner's Point II based upon the incorrect assertion at page 7 of its petition that the balance of 10% was admittedly due is entirely fallacious. Respondent by denials placed in issue the allegations of the complaint except insofar as it admitted that it had only paid $18,201 on account of the 500,000 feet of lumber shipped (Answer, paragraph 11, R. 9, 10). It urged technical defenses in law in defeat of plaintiff's cause of action (R. 6, 7, 10) which for the purposes of the summary judgment motion the District Court side-stepped (R. 151, 152) and it urged that plaintiff had failed to completely perform its contract—a condition precedent to recovery,

in that the contract was an entire contract for 750,000 feet, only part of which had been shipped (R. 10, 151). It was on that theory that respondent consented to offset the amount of $1,078.98 against its recovery (R. 173). The briefs in both courts below show that respondent militantly took that position. The District Court found that the contract provided for the delivery of a total of 750,000 feet (R. 152, 153) although the Circuit Court in its opinion spoke of two contracts as if each order were a separate contract.

Furthermore, while the court is given discretion to award summary judgment on a cause of action alleged in a complaint prior to the final determination of issues raised by a counterclaim, there is only one case that we are able to find (*Seagram-Distillers Corporation* v. *Manas*, 25 Fed. Supp. 233), where that was done; and in that case, it was obvious that the defendant never intended to try its counterclaim. Even there, the court required the plaintiff to furnish a bond conditioned for the payment of any damage the defendant might sustain by reason of the prior enforcement of the plaintiff's judgment. In the New York State courts, it has been held that the existence of a counterclaim is in itself sufficient to defeat an application for summary judgment. *Treacy* v. *Melrose Paper Stock Co.*, 269 N. Y. 155; *Dietz* v. *Glynne*, 221 App. Div. 329; *Aetna Life Insurance Co.* v. *National Drydock and Repair Co., Inc.*, 230 App. Div. 486, *Plaut* v. *Plaut*, 255 App. Div. 375.

POINT III.

Respondent contracted on the basis of the language of its order forms (Exhibits "B", "D", "M", and "N" [pages 112-14, 116-17, 126-7, 128-9]). Petitioner, by accepting the letters of credit furnished by the respondent, undertook to be bound thereby (Exhibits "F", "L", "T", "X", "Y" [pages 119-20, 125, 136-7, 141-2, 142-3]). Actually, it matters not whether respondent's order forms or petitioner's order forms or both sets of forms are used as the basis for the contract. There was a clear breach which petitioner recognized as such.

Clearly with knowledge of the fact that Brazilian was practically out of business, petitioner, in framing its complaint, elected to allege that its contract was with both defendants. Then recognizing the possibility that respondent might counterclaim against Brazilian and petitioner or solely against Brazilian, and that Brazilian might plead over against petitioner, it voluntarily dismissed its complaint as to Brazilian. Thus, the effect of its present pleading is that petitioner alleges that it has contracted with respondent. If it contracted with respondent it could only be on the theory that Brazilian was petitioner's agent. There must have been mutuality of contract. Concededly, there were order forms and correspondence executed and transmitted by and between petitioner and Brazilian and a separate set of order forms and correspondence executed and transmitted by and between respondent and Brazilian. While it is true that there is no evidence in the record that order number 2330 was physically transmitted or exhibited by Brazilian to petitioner, the record is replete with evidence that the contents of order number 2330 were communicated and transmitted to petitioner. The District Court found that Brazilian was petitioner's agent. That finding has necessarily been affirmed by the Circuit Court's

order for mandate even though the Circuit Court in its opinion did not specifically rule on the finding. Since there was substantive evidence to support it, it is not reviewable here.

The District Court also found that at all events, petitioner by bringing this action on the grounds alleged had foreclosed itself from asserting that Brazilian was not its agent (R. 154). The enumeration at the bottom of page 19 and top of page 20 of petitioner's brief is not the only evidence bearing on the legal relationship of Brazilian to the parties. There is much aside from the form of the complaint to substantiate the District Court's finding that Brazilian was petitioner's agent and that it ratified Brazilian's acts.

The entire import of Exhibits 1 to 48 indicates that Brazilian was acting for and on behalf of petitioner. In Exhibit 29, petitioner requests of Brazilian "that in the future, you will do everything possible in order to minimize this loss of ours by selling our product at a price which is more compensating for us" (R. 81). In Exhibit 31 (R. 83) petitioner requested Brazilian to have respondent change the credits so as to reduce the amount of the letters of credit and allow for retention at New York of a sum sufficient to pay freight at the rate of $16.98. See also Exhibit W (R. 140), Exhibit 38 (R. 90), Exhibit 46 (R. 98, 99) Exhibit 47 (R. 99, 100), Exhibit 48 (R. 100, 101).

The order forms on which petitioner relies specify respondent as the purchaser. Respondent's order, although in form addressed to Brazilian, was clearly an order for the sale of lumber by petitioner to respondent and for the purchase of the lumber by respondent. Respondent was not agreeing to pay Brazilian for the lumber. All Brazilian was to get was a commission. Payment was to be made to petitioner who was to receive a letter of credit and the letter of credit was actually drawn in its favor. The entire chain of correspondence

indicates that where any discretion or authority was delegated to Brazilian, it was delegated by petitioner to Brazilian, not by respondent, nor does the fact that we were enabled to obtain Brazilian's files indicate any agency relationship between Brazilian and respondent. The files were obtained by respondent's counsel from Brazilian's counsel after the suit had been commenced (R. 145, 146). Either Brazilian was petitioner's agent or it was merely a middle-man and nobody's agent. If there were two separate contracts, one between petitioner and Brazilian, and the other between Brazilian and respondent, then the situation would be as follows: Either Brazilian as agent for petitioner made a contract with respondent which is mutually binding upon petitioner and respondent (as the District Court found—and necessarily so, since petitioner accepted respondent's letters of credit issued only in pursuance of respondent's orders); or it was not the agent and in such event, respondent is not bound by orders numbered 2042 and 2049. Petitioner, nevertheless, on elementary principles of contract law established as far back as *Lawrence* v. *Fox* (20 N. Y. 468) and ever since followed, would be still liable to respondent for performance of orders numbered 2042 and 2049. Otherwise, why allege, in its complaint, the failure to perform 2049 and an excuse therefor?

Such being the case, it matters not whether the contract provision was that lumber had to be stowed below deck. It does matter that petitioner was required to deliver "Clean lumber, perfectly dry" (R. 43, 73). It is undisputed on this record that if the lumber were shipped on deck, it would completely deteriorate (R. 85, 108). (Note also Ferriera's tacit acknowledgment of this at page 88 of the record). Petitioner recognized that fact when it sent its cable of January 8, 1941, Exhibit 33 (R. 84) stating that it would ship the 250,000 feet on deck "at buyer's responsibility any deterioration". If peti-

tioner had the absolute right to ship on deck, it would have shipped the lumber without sending this cable. It recognized that it did not have such right, that deterioration was inevitable and that it was obligated to ship the 250,000 feet in the same manner as it was obligated to ship the 500,000 feet. (In fact it was willing to do so if respondent would pay the increased freight rate [R. 86, 89, 94].) The sending of this cable was a practical construction by petitioner, of its contractual obligation, which is entitled to great weight if not almost conclusive as to the meaning of the contract. *Insurance Co.* v. *Dutcher,* 95 U. S. 269, 273, *Nicoll* v. *Sands,* 131 N. Y. 19, 24. When we bear in mind that there was specific reference to air-dried lumber and kiln-dried lumber and that a premium was being paid for kiln-dried lumber, it is obvious that it went to the essence of the agreement that the lumber be perfectly dry and that the conjecture which petitioner requests this court to indulge in by way of judicial notice (bottom of page 20, top of page 21, petitioner's brief) is entirely unwarranted.

The statement that petitioner tendered the 250,000 feet of lumber to a carrier is not warranted by anything in the record. The Circuit Court expressly so found (R. 191). The learned Circuit Court embarked upon an extended analysis of the term FOB in giving consideration below to petitioner's assertion that it had made a proper tender in Brazil. But the analysis was unnecessary since this was not an FOB contract, it was a C. & F. New York contract. The term FOB was used solely for the purpose of ascertaining the amount which would have to be paid to petitioner after the freight charges had been deducted from the gross price in order that the final figure payable to petitioner might be ascertained and a letter of credit for 90% thereof issued. The fact remains as the Circuit Court found that petitioner's obligation was to place on board ship at Brazil 250,000 feet of lumber under such a shipping contract as would reasonably assure the transportation of this lumber under conditions such that bar-

ring an untoward event, the lumber would arrive in New York clean and perfectly dry. It never did that. It offered to deliver the lumber to a carrier to be transported on deck, provided respondent would assume responsibility for deterioration. That was a breach of contract whether the contract be respondent's order forms, petitioner's order forms or whether it be spelled out of both sets of order forms and the correspondence.

In fact, originally, petitioner, instead of claiming tender of performance, asserted that performance had been excused by either cancellation or non-availability of a boat (R. 4, 5); and as late as June 18th, 1943, was unable to make up its mind as to which of the latter it would assign as its excuse for nonperformance (R. 26).

Conclusion.

No substantial question of law is presented for review. The application for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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